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No. 97-1139

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

JACINTO RODRIGUEZ-MORENO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) is proper in any district in which the defendant committed the underlying crime of violence, even if the defendant did not use or carry the firearm in that district.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice.

NACDL files this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of respondent. Both petitioner and respondent have granted NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

The primary interest of *amicus* in this case, as it was in *Cabrales*,[2] is the potential impact of this case on the future interpretation of the Venue Clause in other criminal prosecutions. The Government's claim to lay venue in new Jersey in this case represents an unprecedented and unwarranted expansion of its power to choose the place of trial.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

[2] *United States v. Cabrales*, 118 S.Ct. 1772 (1998).

A decision in favor of the Government has the potential to seriously impair the ability of defendants to get a fair trial as guaranteed by the Venue Clause. Trials could be wrenched from the communities in which the 924(c)(1) gun crime was allegedly committed to distant venues based on acts allegedly committed by others in connection with the predicate to the 924(c)(1) offense. By extension, any crime involving multiple elements would permit the Government to roam in any state or judicial district where "any part" of a crime or predicate offense to a crime was committed. Being forced to stand trial while separated from family and friends, removed from work or place of business, and often deprived of representation by defendant's known and trusted counsel is potentially devastating to an effective defense.

The brief of *amicus* does not address every point argued by the parties. The relevant case and statutory law has for the most part been addressed, and duplication of these arguments would not benefit the Court's decisional process. *Amicus* therefore concentrates on two points which may assist the Court in deciding this case -- the historical context for the constitutional venue privilege and the misplaced reliance of both the court of appeals and the United States on the "active verbs" test instead of the actus reus of a 924(c)(1) offense.

SUMMARY OF ARGUMENT

Article III, sec. 2, cl. 3 of the Constitution requires that criminal trials "shall be held in the State where the said Crimes shall have been committed." This provision of the Constitution was adopted even before the Bill of Rights as a protection against governmental oppression. The Framers responded to the fierce opposition of the Colonists to Acts of Parliament that allowed the Crown to force a defendant to trial in alien territory or another colony.

Outrage at the English colonial practice was a reaction to the practical hardships imposed when a defendant was dragged away from family, friends, employment, and sometimes his counsel to stand trial in a distant locale. In short, the Venue Clause protects a defendant from being tried at a far remove from the place of his allegedly criminal conduct.

Petitioner now asks this Court for an unprecedented and unwarranted expansion in its power to choose the venue for a criminal trial in a place because *a predicate offense* of that crime was committed there. The core of the Government's argument is its quotation of the *Lombardo* Court's dictum, out of context, that venue is proper where "any part" of the crime is committed. *United States v. Lombardo*, 241 U.S. 73, 77 (1916).

But, unlike a continuing offense, a 924(c)(1) offense is a point-in-time offense. A 924(c)(1) offense is committed when and where a firearm is used "during and in relation to" a crime of violence or drug offense. It cannot by any plausible interpretation of the statute, consistent with the Venue Clause, be deemed committed before the gun is used or carried. Venue does not "relate back" to the anterior or predicate offense.

Thus, although respondent committed a crime in New Jersey (kidnap), New Jersey was not the site of the 924(c)(1) crime alleged in the indictment. That offense was committed in Maryland, if at all. The Government's attempt to lay venue in New Jersey is unfaithful to the constitutional command that trial be had where the crime was "committed" and more in keeping with the spirit of the English colonial laws, which allowed the Crown to set venue in places chosen for its own convenience and/or for its prejudicial effect on the defendant.

The Third Circuit Court of Appeals reached the correct result despite its unnecessary reliance upon the "active verbs" test.

ARGUMENT

I. THE HISTORY OF THE VENUE CLAUSE COUNSELS AGAINST AN EXPANSIVE INTERPRETATION OF THE PLACE WHERE AN ALLEGED CRIME IS COMMITTED.

The Constitution requires that venue lie at the place where the crime is alleged to have been committed:

> The trial of all Crimes, except in cases of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such a Place or Places as Congress may by Law have directed.

U.S. Const. Art. III, sec. 2, cl. 3. This Court has ruled that venue concerns in criminal trials

> are matters that touch closely the fair administration of criminal justice and public confidence in it. . . . Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy. . . .

United States v. Johnson, 323 U.S. 273, 276 (1944).

The deep issues of public policy arise because the venue privilege is a protection against the arbitrary use of governmental power arising from English laws that allowed the removal of criminal trials to vice-admiralty courts. The Stamp Acts and the Townshend Acts of the 1760's, for example, empowered the vice-admiralty courts to try such cases. Defendants in vice-admiralty courts did not enjoy the right to a jury trial. Criminal charges that would be tried by jury in a colony's courts were heard by a sole judge sitting at the pleasure of the British Crown.[3] Adding insult to injury, venue in many of these cases was set in Halifax, Nova Scotia, where colonial defendants faced several evils: defending themselves in a land foreign to them and without their own counsel, losing their land by the required absence, and an almost certain conviction at the hands of a legal system tilted against them. *Id.* Additionally, the Administration of Justice Act of 1774, another of the "Intolerable Acts," included a provision that allowed venue in other colonies or England for prosecutions of felonies committed by officials.[4]

In reaction to the Intolerable Acts, Edmund Burke noted that English venue would present particular hardship to colonial defendants: "brought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence." Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994) [quoting EDMUND BURKE, LETTER TO

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[3] Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 108-109 (Harvard University Press 1992) (1967).

[4] Alfred H. Kelly and Winfred A. Harbison, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 76 (NORTON 1976) (1948).

THE SHERIFFS OF BRISTOL, THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 189, 192 (Little Brown, 9th ed. 1889)].

The Declaration of Independence also denounces these abuses: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation. . . . For transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence, para. 16 (1776).

A leading treatise on criminal procedure summarizes the historical rationale for venue where the crime was committed:

> The crime-committed formula offered several elements of convenience for the defense. Relevant evidence would most readily be accessible at the place where the incident constituting the alleged offense had occurred. Any witnesses to the incident were most likely to live in the vicinity and any relevant tangible evidence was most likely to be found there. Trial in a distant place would impose upon the defendant the often serious hardship of arranging for the transportation of such witnesses and tangible evidence.

La Fave and Israel, CRIMINAL PROCEDURE 741 (West 2d ed. 1992). Further, note the authors, "the crime-committed formula often facilitated use of jury of the vicinage. . . ." *Id.*

Now, it is true that the historical reason for safeguarding a defendant's venue privilege is not quite as

compelling in the context of a modern mobile society. One critic has observed that the crime-committed test bears "no necessary connection to the location of the victim, witnesses, documents or other similar factors. It does not take account of the residence of the accused. . . ." Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. Rev. 751 (1962). In other words, the goal of protecting a defendant's right to be tried close to home is not necessarily furthered by venue at the situs of the alleged crime if it was committed away from home.

The proper response to this point is two-fold. First, while there is no necessary connection, it is certain that many crimes are in fact committed in a defendant's "backyard" so to speak; as to those, the historical reason for the venue privilege remains intact. The privilege should not be discarded or diminished by a tortured interpretation of the place that the crime is committed because in some cases it does not protect against a distant trial.[5] The constitutional command remains intact. The harm to a defendant who is dragged off to stand trial in an alien venue can hardly be overstated. He will generally be removed from the support of his family and friends, cut off from employment, have less chance of being admitted to bail, and deprived of the assistance of his customary counsel. Even if his regular counsel is free to leave his practice behind and travel to another district, the costs are obviously greater and local rules may require retaining local counsel, thus increasing the costs even more. Even if this is not always true, it is true often enough to counsel against

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[5] The government has presented no empirical evidence to suggest that most federal crimes are committed at a location that inconveniences a defendant or impairs his defense. At the very least, the burden of proof on such an important – and dubious – proposition should rest with the government.

reading the historic protection for the defendant in the manner most favorable to the very government sought to be restrained by the Venue Clause. After all, the Government resides and has counsel in every venue. The defendant does not.

Second, if a crime is alleged to have been committed *by him* at a distant locale, trial there is authorized by the Venue Clause and is fair on a fireside equity basis because the defendant bears responsibility for his distant actions (or those alleged to have been committed by him or by others acting on his behalf). Distant venue based on complicity or conspiracy derives from well-established principles of vicarious responsibility. Distant venue based on a predicate of the offense does not and should not be extended.

II. A 924(c)(1) OFFENSE IS A SEPARATE AND DISTINCT OFFENSE WHICH OCCURS AT THE TIME AND PLACE WHEN AND WHERE THE WEAPON IS USED OR CARRIED.

The rule that venue may be placed in a district where any conspirator acts in furtherance of the conspiracy is settled law. *Hyde v. United States*, 225 U.S.. 347, 357 (1912). Nonetheless, peripatetic venue in a conspiracy case may push the Venue Clause to its outer limits. In *Krulewitch v. United States*, 336 U.S. 440 (1949), Justice Jackson voiced his displeasure with the rule:

> An accused, under the Sixth Amendment, has the right to trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district. Circumstances may even enable the prosecution to fix the place of trial in Washington, D.C. where a defendant may lawfully be put to trial before a jury partly or wholly made up of the Government that accuses him.

Krulewitch at 452-453 (Jackson, J. concurring).

Arguably, placing venue in conspiracy prosecutions anywhere a conspirator agrees or acts is a reasonable response to group criminality; after all, the trial must be held somewhere and, as long as there is to be a joint trial, there is no basis for favoring one codefendant over another. Still, Petitioner offers no compelling reason to extend these harsh results to 924(c)(1) prosecutions. Certainly, a 924(c)(1) offense is not inherently a conspiracy-like crime.

Petitioner also relies on *United States v. Johnson*, 323 U.S. 273 (1944), as supporting its position that a defendant may be tried in any district where there is a use of the mails or instrumentality of commerce. Brief for Petitioner at 17. But we have no such use in 924(c)(1) cases, and the Court in *Johnson* was

> aware of the unfairness and hardship to which trial in an environment alien to the accused

> exposes him. . . . By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. . . . Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution. *Johnson* at 275.

Johnson offers at least two lessons. First, the "force propelled" by respondent with respect to the use of his gun occurred only in Maryland. Second, where "an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id.* Plainly, the Johnson Court recognized the hardship engendered by prosecutions in districts where the defendant did not commit the crime charged either through his own actions or those of another.

Petitioner also argues that the continuing offense rule of 18 U.S.C. 3237[6] should apply. Brief for petitioner at 16. But, the 924(c)(1) violation did not "begin" in New Jersey and

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[6] 18 U.S.C. 3237(a) states:
"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

end in Maryland. Although the underlying kidnap may be a continuing offense, the use of the firearm under 924(c)(1) is not. 924(c)(1) prohibits using or carrying a firearm "during and in relation to" another crime. But the 924(c)(1) offense is itself a point-in-time offense: it cannot occur, as a matter of law, until the weapon is used or carried.

The government's other arguments based on practicalities and convenience are completely misplaced. This is not an issue of *forum non conveniens*. It is an accused's absolute right to insist on separate trials in New Jersey and Maryland for, respectively, the kidnap and the gun charge. It is the accused's exclusive privilege to decide what is in his legal best interest, just as this Court decided in *Faretta v. California*, 422 U.S. 806 (1975), that a defendant has a Sixth Amendment right to choose to represent himself. Petitioner wishes this Court to accept new and unwarranted changes to the constitutional venue protection to make venue plastic and convenient to the government. That is not the law, and appeals to congressional intent underlying 924(c)(1) can be of no avail, since a statute can never trump an explicit constitutional guarantee.

Amicus can see no escape from the logic that a 924(c)(1) offense is not committed unless and until a firearm is used or carried, no matter where the predicate crime to which the firearm is used "during or in relation to" may have begun. In this respect, the active verbs test used by the court below, and cleverly deconstructed by the Government, is unnecessary to a proper analysis of the issue presented: the 924(c)(1) crime is committed where and when the firearm is used or carried regardless of active or passive voices simply because that is the actus reus of the offense.

"[T]he locus delicti must be determined from the nature

of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). Congress' purpose in enacting 924(c)(1) was "to persuade the criminal to leave his gun at home." The *Bailey* Court in construing the term "use" to mean "active employment" illustrated the term's meaning in the following passage:

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. We note that this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."

Bailey v. United States, 516 U.S. 137, 148 (1995) (emphasis added). The underlined phrase highlights the very essence of the offense proscribed in 924(c)(1). In prohibiting the use of a firearm in conjunction with a crime of violence, the section seeks to inhibit the transformation of a given criminal act into one which is torqued with the potential for more violence. *See, e.g., Smith v. United States*, 508 U.S. 223, 240 (1993) (Court stating that "a gun's role in a drug offense as a weapon and its role as an item of barter. . . creates a grave possibility of violence and death in either capacity").

If the section was enacted to inhibit the use of a firearm ***during*** and in relation to a crime of violence, then its commission occurs either contemporaneously with the

predicate offense or at some later time. In other words, a violation of section 924(c)(1) can only be committed where the defendant loses his inhibition and uses or carries a firearm to bring about a change in the circumstances surrounding the predicate offense.

From this it can be seen that the Government's reliance on the "any part" dictum of *Lombardo* is misplaced. The full quotation reads as follows:

> Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy. *Lombardo*, 241 U.S. at 77.

There is no part of the section 924(c)(1) offense occurring before the use or carrying of the firearm in Maryland.[7]

As in *Cabrales*, *supra*, the active-employment of a gun

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[7] It is also apparent from the facts of *Lombardo* that the "any part" language is dictum. In that case alien prostitutes were housed or kept in Washington state, and venue was laid in Washington state. The Supreme Court affirmed dismissal of the indictment, holding that the offense of failure to file a required statement with the Commissioner General of Immigration occurred, for venue purposes, in Washington, D.C., the place where the statement was to be filed. In so holding, the Court rejected the Government's argument that "the offense was a continuing one" since the accused could have "filed" the statement by posting and dropping in any U.S post office the statement addressed to the Commissioner. 241 U.S. at 76.

to facilitate a kidnaping might rank as a "continuing offense," triable in more than one place, if the kidnapper used the firearm in one district and used it again in another or used the firearm continuously in transporting the victim from one state into another state. But, in this case, the firearm was displayed and pointed for the first and only time at the victim in Maryland. It was solely in Maryland where the defendant lost his inhibitions to use a firearm and created "a grave possibility of violence and death." Accordingly, the appropriate place to have tried Respondent was in Maryland and not in New Jersey.

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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